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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 TRAVELERS CASUALTY AND SURETY
10 COMPANY OF AMERICA,

11 Plaintiff,

12 v.

13 WILLIAMS BROTHER, INC., et al.,

14 Defendants.
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2:12-cv-0058-LDG-RJJ

ORDER

16 This matter comes before the court on defendants' Peek Construction Company, ECCL
17 Holdings, LLC, and BLC Nevada Trust dated April 20, 2006's (the "corporate defendants")
18 emergency motion to set aside default judgment and judgment dismissing counterclaim (#248,
19 response #253, reply #260).

20 Background

21 In January 2012, Travelers Casualty and Surety Company of America ("Travelers") filed
22 its complaint with allegations including breach of contract, specific performance, quia timet, and
23 claim and delivery. All individual and corporate defendants filed their answer. Defendant Peek
24 Construction Company also asserted counterclaims against Travelers for breach of contract,
25 breach of the implied covenant of good faith and fair dealing, violation of NRS 338, violation of
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1 unfair claims practices act, violation of consumer practices act, intentional interference with
2 contractual relations, and declaratory relief. Travelers answered the counterclaims.

3 On January 29, 2013, defendants' counsel Pengilly Robbins Slater filed its emergency
4 motion to withdraw as counsel of record based on defendants' nonpayment of fees and lack of
5 communication with counsel. On February 7, 2013, Michael Peek filed an opposition to the
6 motion to withdraw, claiming that he "simply [did] not have sufficient assets left to either pay the
7 Pengilly firm what it is asking, or to find substitute counsel to take over a case . . .". On February
8 8, 2013, the magistrate judge held a hearing, on counsel's motion to withdraw, which defendants
9 Michael and Brenda Peek attended, but continued it to February 22, 2013, in order to hear the
10 motion with all defendants present. The corporate defendants did not appear for the February 22,
11 2013, hearing.

12 On February 25, 2013, the magistrate judge granted defendants' counsel's motion to
13 withdraw. The magistrate judge further instructed that corporations may appear in federal court
14 only through licensed counsel, and ordered that the corporate defendants "shall retain counsel and
15 file with the Court no later than March 11, 2013 a notice of appearance of the newly-retained
16 counsel." The corporate defendants failed to comply with the magistrate judge's order.

17 On March 13, 2013, the magistrate judge issued an order "to show cause in writing, no
18 later than March 26, 2013, why [the corporate defendants] should not be sanctioned and/or why
19 the Court should not recommend that default judgment be entered against them. If Corporate
20 Defendants fail to respond to this order, the Court will recommend that default judgment be
21 entered against them." Once again, the corporate defendants failed to comply with the order to
22 show cause.

23 On April 2, 2013, Travelers filed its motion to dismiss the counterclaim asserted by the
24 corporate defendants, arguing that the corporate defendants had failed to comply with the
25 magistrate judge's orders, and that default judgment should be entered against the corporate
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1 defendants in accord with the magistrate judge's order to show cause. On April 3, 2013, the
2 magistrate judge filed her report and recommendation of entry of default judgment against the
3 corporate defendants. On April 22, 2013, the magistrate judge filed her report and
4 recommendation to grant the motion to dismiss the counterclaim brought by Peek Construction
5 Company. The corporate defendants did not file objections to the report and recommendations.

6 On June 7, 2013, this court issued its order adopting the magistrate judge's report and
7 recommendations that default judgment be entered against the corporate defendants and that
8 Traveler's motion to dismiss Peek Construction Company's counterclaims be granted. On June
9 18, 2013, the court issued the default judgment against the corporate defendants, and the judgment
10 of dismissal of Peek Construction's counterclaim.

11 Analysis

12 At the start, the court emphasizes that, given the circumstances involving the
13 nonappearances and noncompliance of the corporate defendants, the magistrate judge handled this
14 matter in a commendable manner, and her analyses and recommendations were well-grounded.
15 Under a motion for relief from judgment, however, the case now takes on a different posture.

16 In considering a motion to set aside a default judgment under Fed. R. Civ. P. 60(b), three
17 factors should be evaluated: (1) whether the plaintiff will be prejudiced, (2) whether the defendant
18 has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default.
19 Falk v. Allen, 739 F.3d 461, 463 (9th Cir. 1984). In taking these factors into account, the court is
20 sensitive to the principle that default judgments are generally disfavored, so courts should attempt
21 to resolve motions for default judgment to encourage a decision on the merits. See McMillen v.
22 J.C. Penney Co., 205 F.R.D. 557, 558 (D. Nev. 2002) (citing TCI Grp. Life Ins. Plan v. Knoebber,
23 244 F.3d 691, 696 (9th Cir. 2001); see also United States v. Signed Personal Check No. 730 of
24 Yubran S. Mesle, 615 F.3d 1085, 1091 (9th Cir. 2010) ("Crucially, however, 'judgment by default

1 is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be
2 decided on the merits.” (citing Falk, 739 F.2d at 463)).

3 A. Culpable Conduct

4 The parties dispute whether the default judgment was granted based on the corporate
5 defendants’ failure to abide by the orders to appear and show cause by the magistrate judge, or
6 inaction by the corporate defendants because they could not proceed for lack of funds to retain a
7 lawyer. In any event, the corporate defendants were at fault for not making an appearance, even if
8 limited, in compliance with the court’s orders, to explain their circumstances on the record. The
9 question remains whether they should now be relieved of the consequences of their conduct.

10 The court is instructed by the Ninth Circuit’s approach in reviewing the denial of a motion
11 to set aside a default and entering a default judgment in Signed Personal Check No. 730: “We
12 have “typically held that a defendant’s conduct was culpable for purposes of the [good cause]
13 factors where there is no explanation of the default inconsistent with a devious, deliberative,
14 willful, or bad faith failure to respond.” Id. at 1092. The court is also mindful that “[w]hile the
15 same test applies for motions seeking relief from default judgment under both Rule 55(c) and
16 Rule 60(b), the test is more liberally applied in the Rule 55(c) context. This is because in the Rule
17 55 context there is no interest in the finality of the judgment with which to contend.” Id. at 1091 n.
18 1 (citations omitted).

19 Here, while the corporate defendants’ failure to appear was apparently deliberate, the Peeks
20 asserted in their opposition to their counsel’s motion to withdraw that they had inadequate
21 resources to hire counsel for their individual representations. That assertion bears some
22 credibility, as they subsequently notified the court that they would be proceeding pro se. During
23 the sequence of non-appearances of the corporate defendants, there was no effort by the Peeks to
24 document the financial status of those defendants. On the other hand, the court observes that the
25 defendants were correctly advised by the magistrate judge at the time of defendants’ counsel’s
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1 withdrawal that corporations may appear in federal court only through licensed counsel. If the
2 Peeks as principals of the corporate defendants had taken this requirement literally, yet not had the
3 funds to retain counsel for the corporate defendants, they may have seemed to face a catch-22 of
4 sorts. While such an incompatible position is no excuse for failing to make a limited appearance
5 or otherwise inform the court of the corporate defendants' circumstances, the court takes this into
6 account in considering the corporate defendants' culpability, especially in light of the fact that the
7 Peeks were not represented at the time the corporate defendants were required to retain counsel
8 and show cause.

9 The court also considers whether the Peeks or the corporate defendants failed to comply
10 with the magistrate judge's orders in bad faith, "such as an 'intention to take advantage of the
11 opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal
12 process.'" Id. at 1092 (citations omitted). This inquiry takes the court to the defendants' apparent
13 track record of alienating assets during the pendency of Travelers' motions before this court to
14 determine the control of those very assets. However, the record does not directly indicate that the
15 corporate defendants' noncompliance with the court's orders was another attempt to manipulate
16 the legal process or take advantage of an opposing party. "The only outcome that such a failure
17 could have earned [the corporate defendants] was what [they] received: a default [judgment] and a
18 heightened possibility of the loss of [their] property." Id. at 1093 (alterations by the court).

19 Finally, the court recognizes that, according to the affidavits in support of the motion to set
20 aside default judgment, Michael Peek made two unsuccessful attempts to retain counsel before
21 raising enough money to retain his current counsel. Also, before retaining their current counsel,
22 the Peeks filed their election to proceed pro se, and filed documents under that status. Under such
23 circumstances, the court does not find the corporate defendants' level of culpability preclusive of
24 relief from judgment.

1 B. Meritorious Defenses

2 “A defendant seeking to vacate a default judgment must present specific facts that would
3 constitute a defense. But the burden on a party seeking to vacate a default judgment is not
4 extraordinarily heavy.” All that is necessary to satisfy the “meritorious defense”
5 requirement is to allege sufficient facts that, if true, would constitute a defense.

6 Id. at 1094 (citations omitted).

7 The defenses presented by the corporate defendants—Travelers’ unauthorized payment of
8 subcontractors; breach of the implied covenant of good faith and fair dealing; and the
9 inapplicability of the indemnitee agreement to the trust agreement—give the court considerable
10 pause. However, given the low hurdle that a party must meet to enumerate a defense or claim in
11 this context, and the fact that the resolution of legal issues regarding the possible investigatory
12 duties imposed on a surety by Nevada law “would be the subject of the later litigation,” id., the
13 court does not find the meritorious defense factor to impede the setting aside of the judgment.

14 C. Prejudice

15 “To be prejudicial, the setting aside of a judgment must result in greater harm than simply
16 delaying resolution of the case.” Id. at 1095. Here, Travelers points to the defendants’ past
17 conduct regarding its alleged liquidation and concealing of assets and loss of information while
18 defendants were either under contractual obligation to preserve them, or aware of pending motions
19 for the court to determine their disposition. That being as it may, the court takes note that the
20 Peeks, as indemnitor defendants, are currently under a temporary restraining order freezing their
21 assets pending determination of Travelers’ motion for preliminary injunction,¹ which will address

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23 ¹ The parties raise whether the temporary restraining order has now been converted to
24 a preliminary injunction. The parties consented to the continuation of the preliminary injunction
25 hearing for further briefing. After the defaulted defendants filed their motion to set aside default
26 judgment, the court ordered the preliminary injunction hearing rescheduled until after a determination
 on the motion to set aside. The parties did not object to the continuation of the preliminary injunction
 for that purpose. Accordingly, because a preliminary injunction has not been conducted, and because
 the temporary restraining order was noticed, the court considers the temporary restraining order to

Travelers' likelihood of success on the merits on defendants' defenses, counterclaims, and asserted misconduct in alienating or concealing assets.

The court also takes into account that the motion to set aside the default judgment was filed less than a month from the entry of the judgment. Under these circumstances, the court concludes that Travelers will not be prejudiced by granting the relief requested.²

Conclusion

The court will grant the corporate defendants' motion to set aside the default judgment and judgment of dismissal. This matter will proceed to hearing and consideration of Travelers' motion for preliminary injunction of asset freeze. Furthermore, as a matter of docket management, the court will deny Travelers' pending motion for partial summary judgment for specific performance of collateral security clause without prejudice to its reinstatement immediately following the determination on the preliminary injunction of asset freeze. Accordingly,

THE COURT HEREBY ORDERS that defendants' Peek Construction Company, ECCL Holdings, LLC, and BLC Nevada Trust dated April 20, 2006's emergency motion to set aside default judgment and judgment dismissing counterclaim (#248) is GRANTED effective September 9, 2013.

THE COURT FURTHER ORDERS that Travelers shall have, if it chooses to do so, until September 3, 2013, to move to expand the temporary restraining order to include Peek

remain in effect pending the hearing and determination of the preliminary injunction. Defendants have filed an emergency temporary restraining order objecting to the issuance of the temporary restraining order without a bond, and without defendants having had an opportunity to review the proposed order. While defendants have indicated that their damages could be significant during the period of the temporary restraining order, there is a lack of specifics in that regard. If defendants wish the court to consider imposing a bond before the preliminary injunction hearing to be scheduled, they may supplement their emergency motion for temporary restraining order and document the degree of expected damages, or request the court to impose a nominal bond. Otherwise, the matter of the amount of the bond will be taken up at the preliminary injunction hearing.

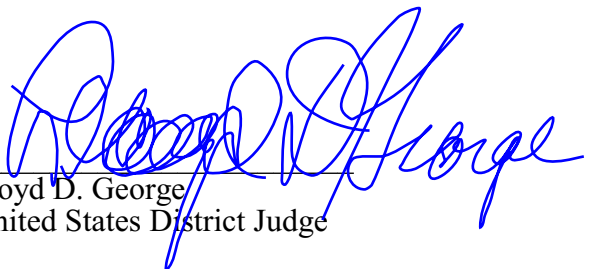
² The court's determination on prejudice is based in part on the temporary injunctive relief currently in place as to the Peeks, and the court will permit Travelers to request an expansion of that relief to include the corporate defendants before this order takes effect.

1 Construction Company, ECCL Holdings, LLC, and BLC Nevada Trust dated April 20, 2006, as of
2 the effective date of the order to set aside. If it does so file, Travelers should also provide a
3 proposed temporary restraining order expanding the injunction relief to the corporate defendants.

4 THE COURT FURTHER ORDERS that a hearing on Travelers' preliminary injunction of
5 asset freeze (#225) shall be conducted on the Thursday, the 12th day of September, 2013, at
6 10:00 a.m., before this court, in courtroom 6B.

7 THE COURT FURTHER ORDERS that Travelers' pending motion for partial summary
8 judgment of specific performance of the collateral security clause (#122) is DENIED without
9 prejudice to its reinstatement immediately following the court's determination of the preliminary
10 injunction of asset freeze.

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12 Dated this 26 day of August, 2013.

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15 Lloyd D. George
16 United States District Judge
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